[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

No. 22-5209

_____

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE.

Defendant-Appellee.

_____

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

BRIEF OF APPELLANT

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

A. Parties and Amici.

The following parties, intervenors, and amici curiae appeared, or sought to appear, below:

Plaintiff: Judicial Watch, Inc.

Defendant: U.S. Department of Justice

The following parties, intervenors, and *amici curiae* are before this Court on appeal:

Plaintiff-Appellant: Judicial Watch, Inc.

Defendant-Appellee: U.S. Department of Justice

B. Ruling Under Review.

The ruling under review is the Memorandum Opinion and Order of the United States District Court for the District of Columbia (Lamberth, J.) issued on July 20, 2022. The ruling can be found at Joint Appendix, pages 8-23.

C. Related Cases.

This case has not previously been up on appeal before this Court and there are no related cases.

/s/ James F. Peterson

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TABLE OF AUTHORITIES

Statutes

Miscellaneous

* Authorities upon which Plaintiff-Appellant chiefly relies are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

District Court	U.S. District Court for the District of Columbia
FOIA	Freedom of Information Act
JA	Joint Appendix
Opinion	Memorandum Opinion of U.S. District Court Judge Royce Lamberth

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered its final judgment on July 20, 2022 (JA 8-23), and a timely notice of appeal was filed on August 3, 2022. JA 128.

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred when it upheld an agency's assertion of a *Glomar* response to a FOIA request despite substantial evidence that the records had been officially acknowledged and involved a widely known investigatory technique.

STATEMENT OF THE CASE

This appeal arises from what appears to be an unprecedented abuse of the financial privacy of thousands of Americans. Substantial and compelling evidence demonstrates that the FBI sought and received records from financial institutions of anyone who used a credit card or engaged in other transactions in the Washington, DC area on January 5 or 6, 2021. This would include many thousands of persons living in the Washington, DC area, including possibly members of this Court. One of these financial institutions, Bank of America, reportedly "actively but secretly engaged in the hunt for extremists in cooperation

with the government" and, following the events of January 6, 2021, gave the FBI financial records of their customers who fit the following profile:

1. Customers confirmed as transacting, either through bank account debit card or credit card purchases in Washington, D.C. between 1/5 and 1/6.

2. Purchases made for Hotel/Airbnb RSVPs in DC, VA, and MD after 1/6.

3. Any purchase of weapons or at a weapons-related merchant between 1/7 and their upcoming suspected stay in D.C. area around Inauguration Day.

4. Airline related purchases since 1/6.

See JA 24 (Exh. A to Plaintiff's Opposition to Def's Summ. J. Mot. (Tucker Carlson: "Bank of America Handed Over Customer Data to Feds Following Capitol Riot," *Fox News* (Feb. 4, 2021)); JA 38 (Exh. B (*MailOnline*, "Bye bye, Bank of America: Outraged customers boycott firm as it's revealed the bank snooped through HUNDREDS of innocent people's accounts looking for Capitol rioters - so who else is doing it?," Dailymail.com (Feb. 5, 2021)). The FOIA request at issue sought details on this unbounded fishing expedition into the records of persons in the Washington, DC area on January 5 or 6 without any reasonable suspicion they were engaged in criminal conduct.

STATEMENT OF FACTS

On February 10, 2021, Judicial Watch submitted a FOIA request to the FBI seeking:

> All records of communication between the FBI and any financial institution, including but not limited to Bank of America, Citibank, Chase Manhattan Bank, Discover, and/or American Express, in which the FBI sought transaction data for those financial institutions' debit and credit card account holders who made purchases in Washington, DC, Maryland and/or Virginia on January 5, 2021 and/or January 6, 2021.

On June 17, 2021, the FBI responded to Judicial Watch's request, claiming that the request was "too broad" and asked for "further clarification and/or narrowing" of the request.

On June 24, 2021, Judicial Watch responded to this request by sending a news article detailing Bank of America's handing over transaction records to the FBI of people in the Washington, DC area around the date of January 6.

On July 1, 2021, the FBI responded to Judicial Watch's FOIA request with a letter stating that it accepts Judicial Watch's narrowing of the search, but that it neither confirms nor denies the existence of these documents. The FBI states:

> The FBI accepts this supplemental correspondence as evidence you are further clarifying and narrowing the subject of your request to records/financial transaction requests from financial institutions pertaining to the alleged riot on Capitol Hill on January 6, 2021, to include records/financial transactions from January 5, 2021 for the 3 jurisdictions.
>
> Please be advised that it is the FBI's policy to neither confirm nor deny the existence of any records which would disclose the existence or non-existence of non-public law enforcement techniques, procedures, and/or guidelines. The acknowledgment that any such records exist or do not exist could reasonably be expected to risk circumvention of law.

This lawsuit then commenced. The District Court subsequently granted the government's motion for summary judgment and denied Judicial Watch's cross motion for summary judgment on July 20, 2022. JA 8. Judicial Watch timely filed a notice of appeal on August 3, 2022. JA 128.

SUMMARY OF THE ARGUMENT

In this matter, the propriety of an agency's *Glomar* response to a FOIA request is once again before this Court. A *Glomar* response is an extreme agency action that should only be used in "rare situations." *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 63 (D.C. Cir. 2018). This is because the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire Co.*, 437 U.S. 214, 242 (1978). Allowing a *Glomar* response here thwarts this purpose. The opinion below extends a degree of deference to the FBI that is not warranted by the record, the FOIA statute, or this Court's precedents. In this case, despite substantial evidence presented that the requested records had been officially acknowledged and involved a widely known investigatory technique, the FBI's assertion of a *Glomar* response was upheld. The District Court's ruling therefore should be reversed, and the case should be remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews summary judgment orders *de novo*. "Under the FOIA, 'the burden is on the agency to sustain its action,' and [the court] reviews de novo the agency's use of a FOIA exemption to withhold documents." *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013); *see* 5 U.S.C. § 552(a)(4)(B).

In carefully limited circumstances, an agency is permitted to provide a *Glomar* response and "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks omitted). The *Glomar* doctrine appears nowhere in FOIA's statutory text or government regulation, but is instead "a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language." *ACLU*, 710 F.3d at 431. This Court has cautioned that courts should not "stretch th[e] doctrine too far" and "give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *Id*. at 431. Hence, a *Glomar* response is an extreme agency action that should only be used in "rare situation[s]." *Bartko*, 898 F.3d at 63.

ARGUMENT

I. The FBI's *Glomar* Response Was Legally Impermissible.

This Court has recognized two ways in which an agency's invocation of the *Glomar* doctrine may be overcome:

First, a plaintiff may challenge the agency's assertion that confirming or denying the existence of responsive records would result in a cognizable harm under a FOIA exemption: "[t]he agency bears the burden of proving that the withheld information falls within the exemption it invokes." *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 678 F.3d 926, 932 (D.C. Cir. 2012); *see also People for the Ethical Treatment of Animals v. Nat'l Institutes of Health*, 745 F.3d 535, 540 (D.C. Cir. 2014); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). To determine whether the existence or not of agency records "fits a FOIA exemption, courts apply the general exemption review standards established in non-Glomar cases." *Wolf*, 473 F.3d at 374; *see also Am. Civ. Liberties Union v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013).

Alternatively, a plaintiff may overcome a *Glomar* response by "showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records," because "[w]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU*, 710 F.3d at

426–27; *see also Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011); *Wolf*, 473 F.3d at 374–75. The FBI's assertion of a *Glomar* response in this case failed both tests.

A. A *Glomar* Response Pursuant to Exemption 7(E) Cannot Shield Use of a Technique Well Known to the Public.

To justify its *Glomar* response pursuant to Exemption 7(E), the FBI must demonstrate that the records sought by Plaintiff were (1) "compiled for law enforcement purposes," and (2) that confirming or denying their existence "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]" 5 U.S.C. § 552(b)(7)(E). The FBI must also show "logically" how the release of the requested information will "risk circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (citations omitted).

In this case, the FBI's *Glomar* response failed to satisfy a fundamental requirement of Exemption 7(E), which only allows the government to withhold "material which describes secret investigative techniques and procedures." *Jaffe v. CIA*, 573 F. Supp. 377, 387 (D.D.C. 1983) (emphasis added). Exemption 7(E) "extends to information regarding obscure or secret techniques," and protects "documents which assertedly relate to law enforcement procedures not known to the public." *Id*. (emphasis added); *see also Smith v. BATF*, 977 F. Supp. 496, 501

(D.D.C. 1997) (requiring agency to "provide greater detail as to why the release of the information . . . would compromise law enforcement by revealing information about investigatory techniques that are not widely known to the general public").

Here, the FBI's invocation of Exemption 7(E) failed as the FBI conceded that seeking records of financial transactions is a "commonly known" law enforcement technique. JA 20 (Dist. Ct. Op. at 12). There is nothing "secret" or "obscure" about the technique to justify use of a *Glomar* response. This conclusion is entirely consistent with decisions evaluating attempts to use Exemption 7(E) to shield its use of an investigative tactic that is known to the public. *Reporters Comm. for Freedom of the Press v. FBI*, 369 F. Supp. 3d 212 (D.D.C. Mar. 1, 2019) (rejecting FBI's assertion of Exemption 7(E) regarding claim that impersonating media members is a secret technique); *Albuquerque Publishing Co. v. Department of Justice*, 726 F. Supp. 851, 857 (D.D.C. 1989) (Exemption 7(E) pertains to investigative techniques and procedures generally unknown to the public." (citations omitted)). Moreover, disclosing the existence or nonexistence of records will not reduce or nullify the effectiveness of the technique as it so widely known. *See Reporters Comm. for Freedom of the Press*, 369 F. Supp. 3d at 223-224.

The FBI also failed to satisfy its burden to "demonstrate logically" how merely confirming or denying the existence of records responsive to Plaintiff's

request would "risk circumvention of the law." *Blackwell*, 646 F.3d at 42. Defendant contended below that it is not publicly known whether financial records were sought as part of the January 6 investigation. JA 20 (Dist. Ct. Op. at 12). As there is nothing "obscure" or "secret" about the FBI seeking financial records, there is no reason to believe persons of interest to the FBI would be unaware that the FBI would seek to obtain such records. It is indisputably widely known that an extensive and ongoing investigation was launched after the events of January 6, 2021. Any potential target of that investigation undoubtedly is aware that a routine investigatory technique of law enforcement is to seek financial records. But in this case, as explained *infra*, the government's own records confirm, not surprisingly, that it sought, obtained, and used financial records as part of its January 6 investigation.

B. The FBI Has Acknowledged the Existence of Records.

Even if the FBI had established that it could properly invoke the *Glomar* doctrine pursuant to Exemption 7(E) – which it did not – the FBI waived its right to assert a *Glomar* response through its own official acknowledgments regarding the records at issue in this case. "[W]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information." *ACLU*, 710 F.3d at 426.

"[I]n the context of a *Glomar* response, the public domain exception is triggered when 'the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,' regardless of whether the contents of the records have been disclosed." *Marino v. DEA*, 685 F.2d 1076, 1081 (D.C. Cir. 2012) (citations omitted) (emphasis in original). This is because, "[i]n the *Glomar* context, the 'specific information' at issue is not the contents of a particular record, but rather 'the existence *vel non*' of any records responsive to the FOIA request." *ACLU*, 710 F.3d at 427 (quoting *Wolf*, 473 F.3d at 379 (emphasis omitted)). "Accordingly, the plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a Glomar response is designed to protect." *Id*.

Here, as demonstrated below, the FBI acknowledged the existence of records in multiple ways. First, publicly available records demonstrate in detail how the FBI sought, received, and used financial records in as part of its January 6 investigation. Submitted by Plaintiff below was a copy of the FBI's Statement of Facts used in support of a criminal complaint in *United States v. Sean Michael McHugh*, No. 21-cr-453 (D.D.C.). JA 54. In order to confirm the identity of the defendant, the FBI states that defendant McHugh's address "is associated with his Bank of America account and recent Expedia transactions." ¶ 31. The FBI would

only be able to make this claim it had communicated with Bank of America and obtained records from Bank of America. Such records of communications between the FBI and Bank of America are responsive to Plaintiff's FOIA request.

In another January 6 case, the FBI confirms that it obtained records from PNC Bank and discusses in detail the multiple ways that it used the financial data:

> PNC Bank provided records related to a credit card account held jointly by BALLENGER and PRICE. On January 6, 2021, BALLENGER and PRICE completed five transactions using this credit card. The first two transactions were at a Sheetz convenience store in Thurmont, Maryland, which is located approximately 16 miles southeast of BALLENGER'S and PRICE'S residence. The next transaction was for $23.70 at the Shady Grove Metro stop in Rockville, Maryland. That stop is located approximately 53 miles south of their residence, between their residence and Washington, D.C. The last two transactions were for parking at the Shady Grove North Garage. Based on my investigation and my knowledge of the area, I submit that these transactions are consistent with BALLENGER and PRICE driving to the Metro and taking a Metro to Union Station in Washington, D.C., on January 6, 2021

JA 69 (Exhibit 2 (*United States v. Cynthia Ballenger and Christopher Price*, No. 1:21-mj-550 (D.D.C.) (Affidavit in Support of Criminal Complaint at ¶19)). This demonstrates again that the FBI received records from financial institutions in this investigation and specifically how they used the records.

The FBI's communications with and use of information from another major financial institution again are confirmed in *United States v. Kevin Douglas Creek*:

> Financial records obtained from JP Morgan Chase bank corroborate Creek used a credit card issued in his name to purchase gas and food en route to and at Washington D.C. from Alpharetta, GA. For

> example, on January 5, 2021, Creek used his credit card at Shell Oil in Petersburg, VA, Quinns in Arlington, VA and at Panera Bread in Burlington, NC. On January 7, 2021, Creek used his credit card at QT in Anderson, SC and at BP in North Chester, VA.

JA79 (Exhibit 3 (No. 21-mj-460) (Statement of Facts at ¶ 16) (D.D.C.)). This again confirms how the FBI accessed and used financial information in the January 6 investigation.

Yet more examples include:

- *United States v. Kevin Louis Galetto* No. 1:21-mj-386 (D.D.C.) JA 88 (Statement of Facts at page 3) (Citibank credit card records used to verify Washington DC hotel stay) (Exhibit 4);

- *United States v. Shane Jason Woods*, No. 21-cr-476 (D.D.C.) JA 99 (Affidavit in Support of Criminal Complaint and Arrest Warrant at ¶ 19 (identifying "several charges made to this bank account in and around Washington, DC between January 5, 2021, and January 7, 2021") (Exhibit 5).

These records confirm that not only did the FBI use financial records as part of its investigation, but it communicated with financial institutions as part of its January 6 investigation specifically and publicly acknowledged its use of financial data in detailed ways. Almost certainly responsive records exist of these communications, at a minimum in the particular cases cited above.

Second, the FBI also acknowledged the existence of records in response to another FOIA request. *See* JA 46 (Exh. D (Declaration of Dan Heily)). Attached to Mr. Heily's declaration is a copy of a FOIA request he submitted seeking records obtained by the FBI from "financial firms" before and after the events of

January 6, 2021. JA 48 (Heily Decl. Exh. 1). The FBI did not assert a *Glomar* response. Instead, the FBI searched for records and stated that "the material you requested is being categorically denied as it is located in an investigative file" and purportedly exempt from disclosure under FOIA Exemptions 7(A) and 7(E). JA 51 (Heily Decl. Exh. 2). The FBI response further acknowledged that the requested records are "law enforcement records" and that their release allegedly would interfere with "pending" law enforcement matters. *Id*. This is an official acknowledgment of the existence of at least some responsive records.

In *ACLU*, this Court explained that judges should not "give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible." 710 F.3d at 431. Deniability must remain "logical," and a statement that is tantamount to an acknowledgement is sufficient to overcome a *Glomar* response, even if the statement is not explicit about the existence of records. *Id*.

C. A *Glomar* Response Under Exemption 7(E) Is Not a Shield for Improper Activity.

The FBI cannot use Exemption 7(E) to attempt to shield use of improper "techniques or procedures." Government misconduct can prevent agencies' use of FOIA exemptions and *Glomar* responses. *See e.g., Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (reaffirming that disclosure may be permitted when necessary to confirm or refute evidence that the government is

engaged in misconduct;); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1181-82 (D.C. Cir. 2011) (rejecting the FBI's *Glomar* challenge).

In this case, the FBI appears to have conducted an improper, broad sweep of financial records, not just those of persons it had reason to believe were involved in the events of January 6, but many more Americans. Detailed media reports not only indicate that the FBI sought financial records, but also set forth in detail the specific criteria and scope of the records obtained. JA 24, 38. As described in the declaration of Kevin R. Brock, former FBI Assistant Director for Intelligence, such a broad sweep of financial records would be improper. JA 42.

According to Mr. Brock, the FBI has several legal avenues available to it to pursue private individuals' financial information. These include "obtaining a federal grand jury subpoena, a court ordered search warrant, or National Security Letter." *Id*. ¶ 6. At all times the FBI is guided and governed by federal laws including the Attorney General Guidelines ("AGG"), now alternately referred to as the Domestic Investigations and Operations Guide ("DIOG"). *Id*.

As further explained by Mr. Brock, a request "by the FBI of certain banks to voluntarily turn over to the FBI the private financial transaction data of any bank customer who happened to be in a certain broad geographical area on a certain date could be interpreted as an effort to circumvent protection embedded in the AGG and DIOG." *Id*. ¶ 7. This is because, as set forth by the AGG, "the FBI may not

collect and store intelligence information on an individual, especially when that individual is a U.S. citizen, without articulating reasonable suspicion that the individual was, is, or is about to be engaged in a violation of federal law." *Id*. Mr. Brock further states that a "blanket sweep of all bank customer transactions in a certain area at a certain time does not meet the bare minimum reasonable suspicion threshold since a significant amount of data would logically include innocent and lawful transactions the FBI does not have the right to collect." *Id*. As a result, "a request by the FBI for voluntary cooperation by the banks would net information the FBI would not otherwise be able to legally obtain." If confirmed, the FBI's efforts would constitute an "extra-constitutional work around" that "potentially enabled inappropriate government surveillance of lawful activities." *Id*.

Only lawful and proper techniques and procedures are entitled to protection under Exemption 7(E). For this reason as well, Defendant's *Glomar* response should be rejected.

II. No Other Reason Justifies a *Glomar* Response.

As demonstrated above, there is nothing "secret" about the FBI's use of financial data in general, and in the January 6 investigation in particular. The FBI records discussed above demonstrate this as well as the various ways the FBI used the data to confirm the location of defendants. *Jaffee v. CIA*, 573 F. Supp. 377, 387 (D.D.C. 1983).

The FBI failed to "demonstrate logically" how merely confirming or denying the existence of records responsive to Plaintiff's request would risk "circumvention of the law." *Blackwell v. FBI*, 646 F.2d 37, 42 (D.C. Cir. 2011). In publicly available records, the FBI has disclosed its use of financial data in the January 6 investigation and the specific ways it used the data. Any potential suspect long ago was alerted to this investigation and the FBI's use of financial data has been acknowledged. In light of this, no "logical" reason exists for the FBI to continue to refuse to confirm or deny the existence of records.

Finally, Plaintiff more than adequately demonstrated that the FBI may have sought and received records from financial institutions of anyone who used a credit card or engaged in other transactions in the Washington DC area on January 5 or 6. If so, this would be an unprecedented abuse of the financial privacy of thousands of Americans. Plaintiff's FOIA request to investigate this should not be blocked by a meritless *Glomar* response. FOIA is not shield, but a pathway to uncover improper government activity.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that this Court reverse the District Court's order granting summary judgment and remand for further proceedings.

Dated: November 7, 2022

Respectfully submitted,

/s/ *James F. Peterson*

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 4,575 words (using Microsoft Word 2016), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November 2022, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLANT** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ James F. Peterson